

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

JERRY E. KILL,	)	
	)	
Plaintiff,	)	Case No. 06-494-KI
	)	
vs.	)	OPINION AND ORDER
	)	
JANE E. KINNE,	)	
	)	
Defendant.	)	

Jerry E. Kill  
5212 N. E. 28th  
Portland, Oregon 97211

Pro Se Plaintiff

Karin J. Immergut  
United States Attorney  
District of Oregon  
Scott Erik Asphaug  
Assistant United States Attorney  
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Portland, Oregon 97204

Attorneys for Defendant

KING, Judge:

*Pro se* plaintiff Jerry E. Kill brings an action alleging defendant Jane E. Kinne slandered and libeled him. Before the court is the United States of America's Motion to Substitute (#4), and the United States of America's Motion to Dismiss (#5). Plaintiff has not filed a response to either motion. For the following reasons, I grant both motions.

### LEGAL STANDARDS

Under the Federal Employees Liability Reform and Tort Compensation Act ("FELRTCA"), the Attorney General or his designee may certify that the defendant was acting within the course and scope of his employment, thereby converting the action into one against the United States. 28 U.S.C. § 2679(d)(1); 28 C.F.R. § 15.3. Plaintiff bears the burden of disproving the Attorney General's employment certification. Green v. Hall, 8 F.3d 695, 698 (9th Cir. 1993). Once the United States is substituted for the named defendant, the Federal Tort Claims Act is plaintiff's only avenue of recovery. See id.

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(1) addresses the court's subject matter jurisdiction. The waiver of sovereign immunity is a question of subject matter jurisdiction. McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989). The party asserting jurisdiction bears the burden of proving that the court has subject matter jurisdiction over his claims. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). The court is not restricted to the pleadings but may rely on any evidence, including affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction. McCarthy, 850 F.2d at 560.

## DISCUSSION

### I. Substitution of United States for Jane E. Kinne

Plaintiff has not met his burden of disproving the Attorney General's certification, through the United States Attorney, that Jane E. Kinne "was acting within the course and . . . scope of her employment at the time of the allegations contained in the Multnomah County Notice of Small Claim." United States Attorney Certification. Therefore, the United States will be substituted for Jane E. Kinne.

### II. Motion to Dismiss

To proceed with a suit against the United States, there must be a waiver of sovereign immunity. Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471, 475 (1994). The Federal Tort Claims Act ("FTCA") includes a limited waiver of sovereign immunity, except in particular instances that are listed in 28 U.S.C. §§ 2680 (a)-(h). Subsection (h) specifically excepts any claim arising out of libel or slander from the FTCA waiver of immunity. Accordingly, because the federal government has not waived immunity over claims arising out of libel or slander, and because that is plaintiff's only claim here, this Court lacks subject matter jurisdiction over the action.

In addition, pursuant to the provisions of FTCA, plaintiff was required to provide notice to the Department of Veteran's Administration prior to instituting this action. 28 U.S.C. § 2675. Plaintiff failed to abide by this requirement, and as a result this Court lacks subject matter jurisdiction. Declaration of Scott Erik Asphaug in Support of Motion to Dismiss, at 2; Blair v. IRS, 304 F.3d 861, 868, 869 (9<sup>th</sup> Cir. 2002).

### **CONCLUSION**

For the foregoing reasons, I grant the United States of America's Motion to Substitute (#4) and the United States of America's Motion to Dismiss (#5).

IT IS SO ORDERED.

Dated this 9th day of May, 2006.

/s/ Garr M. King  
Garr M. King  
United States District Judge